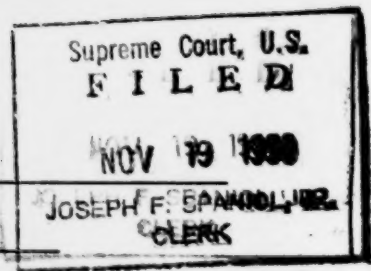


80-800
NO. _____



IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JAMES O. BLACKSHIRE, JR., Petitioner,

v.

MONIKA M. BLACKSHIRE, Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT**

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QUESTIONS PRESENTED

1. Are the states preempted from characterizing military disability retirement pay as a marital community asset?

2. Do the states lack subject matter jurisdiction over military disability/Veterans' Administration benefits?

3. Can subject matter jurisdiction be attacked at any time?

4. Did the court below misinterpret and misapply U. S. statute and case law?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JAMES O. BLACKSHIRE, JR., Petitioner,

v.

MONIKA M. BLACKSHIRE, Respondent

***PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT***

The petitioner JAMES O. BLACKSHIRE, JR., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the State of California, Third District, entered in the above-entitled proceeding on May 30, 1990.

OPINIONS BELOW

The opinions of the Superior Court of the State of California for the County of Sacramento are unreported; however, they are printed in Appendix D and Appendix E, *infra*. The opinion and the denial of Petition for Rehearing of the Court of Appeals for the State of

California, Third District, are unreported; however, they are printed in Appendix A and Appendix B, *infra*. The denial of Petition for Review by the California Supreme Court is unreported; however, it is printed in Appendix C, *infra*.

JURISDICTION

The Order of the Superior Court, awarding Respondent herein a property interest in the disability retirement benefits of Petitioner herein at the time Petitioner would be eligible for length of service retirement, had he been eligible to remain on active duty; and retaining jurisdiction over those benefits was entered on October 14, 1980.

On July 28, 1988, a further order of the Superior Court was entered in response to the motion of Respondent herein, ruling that Petitioner is obligated to pay Respondent her one-half share in the community interest in his military retirement from the time that he would have had 20 years military service had

he not been retired for disability, and ordering him to pay to her directly that portion of his retirement as it was received thereafter.

On May 30, 1990, California Court of Appeals, Third District, affirmed that ruling, and ruled that the matter was *res judicata* as to the original judgment, the issue not having been raised by the trial court, and not having been briefed by either of the parties.

On August 22, 1990, the California Supreme Court denied Petitioner's Petition for Review.

This Petitioner for Writ of Certiorari is being docketed within 90 days of the California Supreme Court's denial of Petitioner's Petition for Review.

Petitioner argued below that the trial court had exceeded its jurisdiction by substantially infringing the authority of the Congress; that military disability pay is not an asset of a marital community to be divided by the parties in a dissolution of marriage

under Federal Statute and U. S. Supreme Court case law; and that the trial court had misinterpreted and misapplied the Federal Uniform Services Former Spouses' Protection Act (10 U.S.C. 1408).

This Court's jurisdiction is involved under 28 U.S.C. 1257(2); *Dahneke-Walker Milling Co. v. Bondurant*, (1921) 257 U.S. 282; *McCarty v. McCarty*, (1981) 453 U.S. 210; and *Mansell v. Mansell*, (1989) 490 U.S. ____.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case also involved the Federal Uniformed Services Former Spouses' Protection Act (hereinafter referred to as "FUSFSPA", 10 U.S.C. § 1408, which provides in subparagraph (c)(1), as follows:

Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

The entirety of § 1408 is set forth in Appendix F, along with Constitutional provisions which Petitioner invokes in his behalf: The Supremacy Clause, Article VI, Clause 2; Article I, § 8, Clauses 12, 14 and 18 [providing exclusive delegation of authority to Congress to raise and support armies].

STATEMENT OF THE CASE

Petitioner JAMES O. BLACKSHIRE was married to Respondent MONIKA M. BLACKSHIRE on August 24, 1966. At that time Petitioner was serving on active duty as a non-commissioned officer of the United States Army. On May 7, 1975, after have served a period of 15 years, 3 months and 1 day, he was placed on the Temporary Disability Retirement List, and on February 28, 1977, was placed on permanent disability retirement from the United States Army.

The trial court determined that during the period of Petitioner's military service, the parties were married 9 years and 4 months.

Has Petitioner been allowed to remain on active duty, he would have been eligible for longevity retirement of 20 years on February 1, 1979.

Subsequent to his being placed on permanent disability retirement from the United States Army, Petitioner opted for benefits from the Veterans' Administration under the provisions of Title 38 U.S.C. § 331. As a result, he was required to waive his U. S. Army disability retirement benefits.

As the consequence of a default hearing, the Sacramento Superior Court, on October 14, 1980, entered an Interlocutory Judgment of Dissolution of the marriage, in which the court ordered that Respondent herein receive monthly payments of equal to one-half of that portion of the retirement equal to the following fractions:

Nine (9) years and four (4) months (from
January 1967 to May 1975

Total years of military service

and confirmed Petitioner's retirement benefits

earned prior to January 6, 1967 as his separate property. The Court retained jurisdiction over Petitioner's retirement.

On March 11, 1988, the respondent herein filed with, and had issued by, the Sacramento County Superior Court an Order for the petitioner herein to Show Cause why, *inter alia*, the Court should not clarify the judgment to conform to FUSFSPA. The matter was briefed, argued and submitted to the Court, both parties being represented by counsel.

The Court considered the matter and, on July 20, 1988, issued its Notice of Ruling on Submitted Matter, affirming the prior ruling of the Sacramento County Superior Court. The Court, in its ruling, did not rule on the prior ruling being *res judicata*, and discussed the matter thoroughly, citing California cases preceding and subsequent to the initial judgment.

Appellant appealed the ruling to the California Appellate Court, Third District,

where the issues were briefed and oral arguments were heard. The Court raised, for the first time at oral argument, the issue of the initial judgment being *res judicata*. The Court then issued its findings on May 30, 1990.

In that decision, the appellate court held the original judgment to be *res judicata*, but proceeded to discuss the community property characteristics of the disability retirement pay raised in the ruling of the superior court, from which appeal was taken. The appellate court decision affirmed the judgment (order) of the superior court.

HOW THE FEDERAL QUESTION WAS PRESENTED:

On June 14, 1990, Petitioner herein filed a Petition for Rehearing with the Court of Appeal of the State of California, Third District. The basis for the petition was, *inter alia*, that the issue of *res judicata* was not addressed by the trial court and was not briefed by either party. Further basis was

stated that allowing the 1980 Judgment to stand would substantially infringe the authority of the United States Congress in providing disability retirement pay to those persons disabled in the service of their county, citing *McCarty v. McCarty* (1981) 453 U.S. 210, 232, referencing U. S. Constitution, Article I, § 8, Clauses 12, and 14.

Petitioner's Petition for Rehearing was denied and Petitioner filed with the Supreme Court of the State of California a Petition for Review on July 9, 1990. In that petition, Petitioner argued that Article I, § 8 and Article VI of the Constitution of the United States had been violated by the court below.

The California Supreme Court denied Petitioner's Petition for Review and Petitioner now petitions this Court for a Writ of Certiorari.

THE QUESTIONS ARE SUBSTANTIAL

The questions warrant plenary consideration for the following reasons:

I

THE DECISION BELOW CONFLICTS WITH THE FEDERAL STATUTORY SCHEMA FOR THE RAISING AND SUPPORTING OF THE ARMIES FOR DEFENSE AND VIOLATES THE SUPREMACY CLAUSE

Congress alone has the power and authority to regulate the pay for military service and to determine what constitutes military service for which compensation is required or payable.¹ State Courts may not redefine mili-

¹. *United States v. Standard Oil* (1947) 332 U.S. 301 [holding personnel affairs/pay subject exclusively to U. S. regulations]; *United States v. Tarble* (1872) 80 U.S. 397 ["Now, among the powers assigned to the National Government, is the power 'to raise and support armies' and the power 'to provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, ...the compensation he (serviceman) shall be allowed. ...No interference with the execution of this power the National Government in the formation, organization and government of its armies by any state officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy this branch of public service," at page 408), cited with approval in *McCarty v. McCarty* (1981) 453 U.S. 210, 232-234].

tary disability retired pay.²

Moreover, Congress may not delegate its authority granted to it exclusively by the United States Constitution to the States.³

Article VI of the Constitution of the United States provides that said Constitution, and the Laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, and the judges of every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Congress of the United States, under its power to regulate land and naval forces enacted statutes (Chapter 61, 10 U.S.C. § 1201 and Title 38 U.S.C. § 3104 for the purpose of providing financial security of personnel forced by physical disability to retire from

². *Wissner v. Wissner* (1950) 338 U.S. 655.

³. *Knickerbocker Ice Company v. Steward* (1920) 253 U.S. 149 [holding that delegation of seaman's remedies to state laws is unconstitutional].

military service.⁴ (Emphasis added)

The United States Supreme Court found that the application of community property principles to military retirement pay threatens grave harm to "clear and substantial" federal interest. (*McCarty v. McCarty* (1981) 453 U.S. 210, 232) In support of that holding *McCarty* cites earlier cases, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581-583 and *United States v. Yazell*, 382 U.S. 341, 352.

McCarty post-dates the original judgment in this case and is not retroactive. *McCarty* does recite what the state of the law was, and had been, at that time. In fact, *McCarty* suggested that if the Congress desired to change the state of the law, that legislation should be enacted. In response to that suggestion, Congress enacted the Federal Uni-

⁴. Subcommittee on Investigations, House Committee on Post Office and Civil Service, Dual Compensation Paid to Retired Uniformed Services Personnel in Federal Civilian Positions, 95th Congress, 2d Sess, 18-20 (Comm. Print 1978), p. 19.

formed Services Former Spouses' Protection Act.⁵

The Congress, in drafting FUSFSPA, defined disposable retired pay as the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired under Chapter 61 of this title.) (Emphasis added.)

That would certainly indicate that it was the intent of Congress to exclude all entitlements under Title 10, Chapter 61 from disposable retired pay subject to an order of the state court. That leaves Chapter 61 entitlements in the same character as they were prior to *McCarty*, and described by *McCarty* as subject to exclusive federal control, and not subject to division by state courts upon dissolution of marriage. (See *infra* discussion of effect of transmutation of Chapter 61 disability retirements to Title 38 Veterans' disabili-

⁵. 10 U.S.C. § 1408

ity benefits)⁶

II

THE STATES LACK SUBJECT MATTER JURISDICTION OVER MILITARY DISABILITY/VETERANS' DISABILITY BENEFITS.

As pointed out, *supra*, the Congress of the United States alone has the power to regulate land and naval forces, and in exercising that power enacted statutes for the purpose of providing financial security for personnel forced by physical disability to retire from military service.

It was pointed out in the court below by the respondent herein that Petitioner herein had waived his Chapter 61 benefits in order to receive Title 38 veterans' disability benefits. (See Appendix G)

Respondent argued that, by so doing, under California law, Petitioner had transmuted his benefits to a community asset subject to division by the court at dissolution of the

⁶. 38 U.S.C. §§ 314, 355.

marriage, analogizing the situation to one in which a waiver of military retirement benefits for veterans' benefits serves to defeat the spouse's interest in the military retirement benefits. A waiver of benefits in which no community interest exists cannot transmute that asset into a community asset.

Under the provisions of the appropriate constitutional provisions, as well as statute, Congress reserves unto itself the authority to administer disability benefits to the military service; therefore, the states lack jurisdiction to award a portion of such benefits to a former spouse in the dissolution of a marriage. That was the law before *McCarty*; it was clarified and stated affirmatively in *McCarty (McCarty v. McCarty (1981) 453 U.S. 210, 232)* and, it was carried through by the enactment of FUSFSPA.

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III

SUBJECT MATTER JURISDICTION IS SUBJECT TO ATTACK AT ANY TIME, IRRESPECTIVE OF THE DOCTRINE OF *RES JUDICATA*

Under a reservation of jurisdiction by the trial court over Petitioner's military retirement benefits, Respondent herein asked the court to clarify the judgment to conform to FUSFSPA. The court proceeded to do so, without regard to the doctrine of *res judicata*, which was not addressed by either of the parties.

On appeal, the appellate court first raised the question of *res judicata* at oral argument and, in its decision, ruled that the 1980 judgment was final and could not be attacked under the doctrine of *res judicata*, but proceeded to discuss the merits of the holding of Petitioner's disability retired pay as a community asset.

These holding were attacked on the Petition for Rehearing and the Petition for Review to the California Supreme Court, citing the

federal statutory and constitutional provisions.

When a court has rendered a judgment in a contested matter, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if:

* * * * *

(2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government;

* * * * *

Restatement of Law - Judgments Second §12

The trial court looks to the waiver of the Chapter 61 benefits in favor of Title 38 veterans' disability benefits as a transmutation of those benefits from separate to community property under then-existing case law.

The appellate court properly denies that the Former Spouses Protection Act controls that characterization of James' Title 38 benefits as community or separate property,

but for the wrong reasons. The Court holds the act not applicable because to apply it would offend the principles of *res judicata*.

The reason that FUSFSPA does not apply to the retirement benefits of the petitioner is that the acts specifically exclude the Chapter 61 disability retirement benefits, thus none of the other provisions of FUSFSPA are applicable, including those deducting Title 38 benefits from gross retirement in order to arrive at a disposable portion of that retirement.

By its exclusion, FUSFSPA leaves the status of Chapter 61 disability retirement pay as that provided by *McCarty*, as defined by *McCarty*.

The common thread running through all the California cases was that a service member, having completed sufficient service to retire on the basis of longevity, could not defeat his spouse's interest in the community asset of longevity retirement benefits by electing to receive disability benefits in lieu of

matured retirement benefits. *In re Marriage of Stenquest* (1978) 21 Cal.3d 779.

In the present case, the petitioner had no matured right to retirement and, upon being placed on the permanent disability retirement list, he was *divested* of all longevity retirement rights.

The appellate court below cited *In re Marriage of Pace* (1987) 132 Cal.App.3d 548 for the proposition that a spouses disability retirement pay becomes a community asset after that employed spouse reaches the age or length of service when he would have been eligible to retire had not been compelled to retire prematurely.

In *Pace*, the employed spouse was employed by the federal Veteran's Administration, and was involuntarily retired because of injuries incurred in an automobile accident. He would have been eligible for longevity retirement at age 55, and for an annuity at age 62. Upon his reaching age 55, the wife was awarded a

portion of his disability retirement pay. On appeal, the court ruled that the right to a longevity pension failed to vest when he involuntarily left his employment, just as it would have failed to vest had he voluntarily quit. Therefore, he would never become eligible for a longevity retirement. *In re Marriage of Pace*, supra, p. 554. *Pace*, an exact parallel to the present case in that respect, distinguished other cases relied upon by the trial court, as well as the appellate court below in this case.

Petitioner is unaware of any California case which has divided Title 10 Chapter 61 disability retirement as community property, whether it had been waived for Title 38 benefits or not.

Even if the issue of the subject matter jurisdiction was raised and determined, but it also appears that there has been substantial change in the applicable legal context, or that the exercise of jurisdiction infringes a

substantial public interest, then relitigation is warranted. *Restatement of Law - Judgments Second §12 Comment: C.*

In *Mansell*, [*Mansell v. Mansell* (1989) 109 S.Ct. 2023, fn 5], this court found that the California Court of Appeal decided it was appropriate under California law to reopen the settlement and reach the federal question, and therefore the federal question was properly before this court.

In the present case, the California Court of Appeals, Third District, although applying the doctrine of *res judicata* reopened the judgment, and discussed the merits, thus giving rise to the federal question, and properly bringing the matter before this court.

IV

THE COURT BELOW MISINTERPRETED AND MISAPPLIED U.S. STATUTE AND U.S. AND CALIFORNIA CASE LAW

The trial court, in its ruling on submitted matter of July 20, 1988 did not purport to apply the provisions of FUSFSPA to the mili-

tary disability pay of Petitioner herein, although the ruling was in response to Respondent's request for clarification of the judgment to conform to FUSFSPA. The trial court responded under the California law as it existed at the time, but later changed as a result of *Mansell*, supra.

The appellate court did not take into consideration that FUSFSPA specifically excluded disability retirement pay of a member retired for disability under Chapter 61 of Title 10 of the United States Constitution, but discarded, application of FUSFSPA under the Doctrine of *Res Judicata*.

CONCLUSION

To permit states to award a portion of a military service members' disability retirement pay would seriously infringe on the authority of Congress provided for in Article I, §8 of the Constitution of the United States, thus denying financial security to personnel forced by disability to retire from military

service as intended by the Congress.

For this reason, and others discussed above, this petition for certiorari should be granted.

Respectfully submitted,

THIELEN & THIELEN

/s/ Raymond J. Thielen

RAYMOND J. THIELEN ,
Counsel for Petitioner

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. _____

JAMES O. BLACKSHIRE, JR.

vs.

MONIKA M. BLACKSHIRE

The Clerk will enter my appearance as
Counsel of Record for JAMES O. BLACKSHIRE, JR.
who IN THIS COURT is Petitioner.

I certify that I am a member of the Bar
of the Supreme Court of the United States:

/s/ Raymond J. Thielen

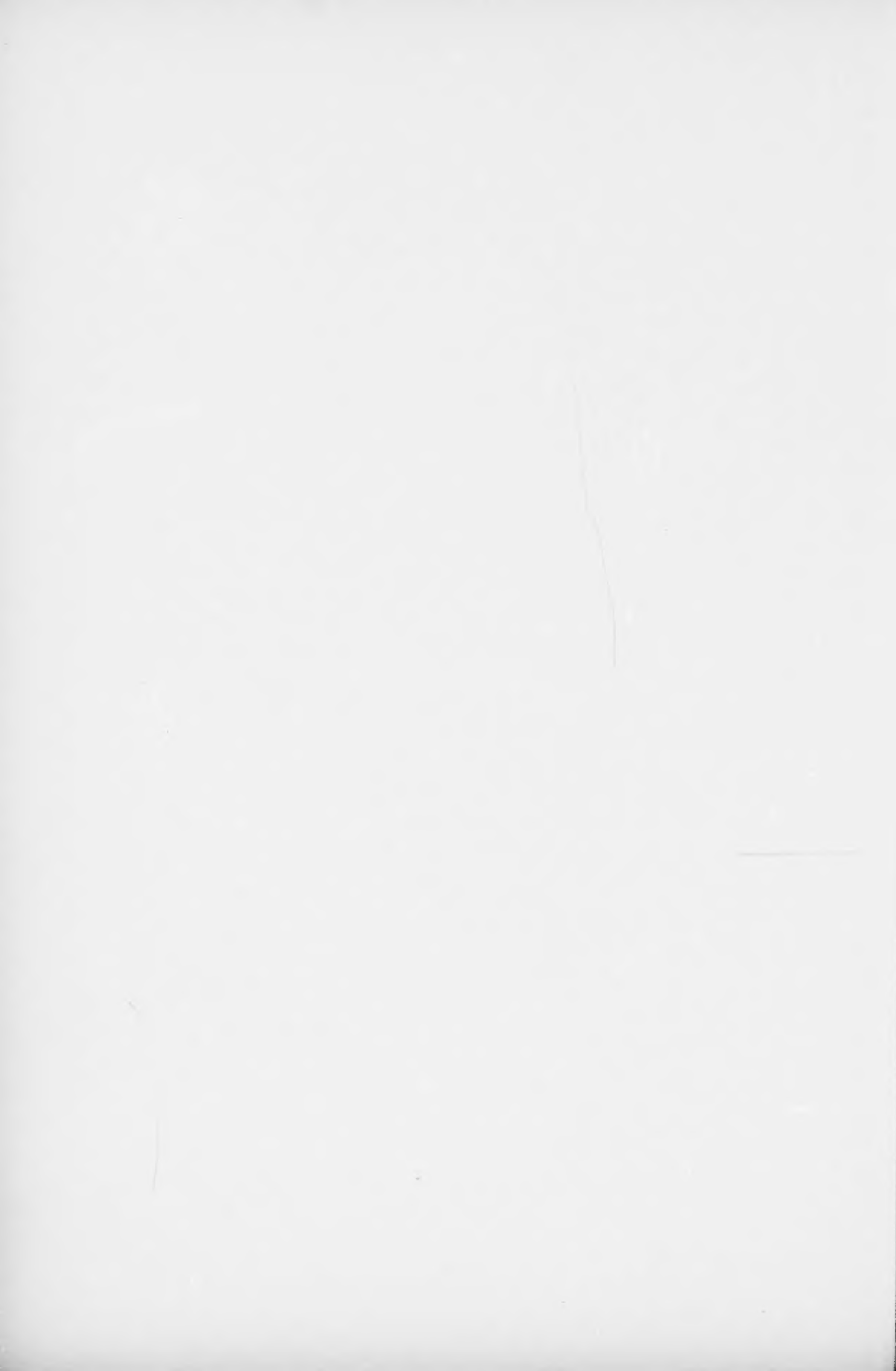
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CERTIFICATE OF SERVICE

I, RAYMOND J. THIELEN, a member of the Bar of this Court, hereby certify that on this 15th day of November, 1990, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to DONALD H. LATZER/MARY NEAL FLEMING, Jacoby & Meyers, 7331 Greenback Lane, Citrus Heights, California, 95621, counsel for the respondent herein. I further certify that all parties required to be served have been served.

/s/ Raymond J. Thielen

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

- C O P Y -

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT
(Sacramento)

In re the Marriage of	)	C005223
MONIKA M. and JAMES O.)	
BLACKSHIRE, JR.	)	(Super.Ct.No.
-----	)	726258)
)	
MONIKA M. BLACKSHIRE,	)	FILED
	)	May 30, 1990
Respondent,	)	Court of Appeal-
	)	Third District
v.	)	Robert L. Liston
	)	Clerk
JAMES O. BLACKSHIRE, JR.)	)	By _____
	)	Deputy
Appellant.)	

James and Monika Blackshire were married in January 1966. In May 1975, after a little over 15 years as a regular enlisted member of the army, James was placed on the army's temporary disability retired list with a disability rating of 100 percent. (See 10 U.S.C. § 1202.) He was subsequently permanently retired as unfit for duty because of physical disability rated at 60 percent. (See 10

U.S.C. § 1201.) He applied for and received Veterans Administration (title 38) disability benefits (see 38 U.S.C. § 331), for which he was required to waive a like amount of the retired pay to which he was otherwise entitled under title 10 (see 38 U.S.C. § 3105). Title 38 disability benefits are calculated according to degree of disability and are based upon average impairments in earning capacity resulting from such disability in civil occupations. (38 U.S.C. §§ 314, 355.) James's title 38 benefits are paid to him based on 100 percent disability.

In 1979, Monika filed a petition for dissolution of the marriage, with which James was personally served. Among the property listed in the petition as subject to disposition by the court was James's "retirement benefits" derived from his military service during the couple's marriage. Monika requested that she receive 50 percent of those benefits. James defaulted on the petition, and on

October 14, 1980, an interlocutory default judgment of dissolution was entered. Monika waived spousal support. The court retained jurisdiction over James's "retirement benefits" and ordered him to make monthly payments to Monika equal to one-half of that portion of those benefits earned during the marriage. Final judgment was entered on December 16, 1980, notice of which was mailed to James. He did not appeal that judgment.

On March 11, 1988, Monika sought an order enforcing the judgment with respect to James's "retirement benefits." The parties took opposing positions on whether James's title 38 benefits taken in lieu of title 10 retired pay may properly be characterized as community property. The trial court ruled that, at the point James would have had 20 years of service in the army, the predominant function of his title 38 benefits was to provide support rather than to compensate him for his disability and lost earnings. The court ruled the

community was entitled to that portion of the benefits earned during the marriage and equal to the amount James would have earned as a service pension had he continued in the service and retired after 20 years at the rank he had attained when retired under title 10. To the extent James's benefits exceed that amount, however, they are attributable to his disability alone and are therefore his separate property. The court ordered James to account for arrearages and to pay Monika her share of the benefits as thereafter received. James appeals from that order. (See Code Civ. Proc., § 904.1, subd. (b); In re Marriage of Justice (1984) 157 Cal.App.3d 82, 86, fn. 4.)

At the outset, we dispose of any notion that the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA) (10 U.S.C. § 1408) controls the characterization of James's title 38 benefits as community or separate property. FUSFSPA was enacted September 8, 1982 (eff. Feb. 1, 1983), in re-

sponse to the United State Supreme Court decision in McCarty v. McCarty (1981) 453 U.S. 210 [69 L.Ed.2d 589], which held that military nondisability retired pay was subject to exclusive federal control and that state courts were therefore precluded from dividing it upon dissolution of a marriage. (See Aloy v. Mash (1985) 38 Cal.3d 413, 421-422, fn. 7.) FUSFSPA provides that "a court may treat disposable retired or retainer pay payable to a member [of a uniformed service] for pay periods beginning after June 25, 1981 [the day before McCarty was decided], either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." (10 U.S.C. § 1408(c)(1).) FUSFSPA expressly excludes from the definition of "disposable retired or retainer pay" military retirement pay waived in order to receive veterans disability payments under title 38. (10 U.S.C. § 1408(a)(4)(B).) In Mansell v. Mansell (1989)

490 U.S. ____ [104 L.Ed.2d 675], the United States Supreme Court construed FUSFSPA's "plain and precise language" (490 U.S. at p. ____ [104 L.Ed.2d at p. 687]) as precluding state courts from treating, as property divisible upon divorce, military retirement pay that has been waived to receive veterans disability benefits. (490 U.S. at p. ____ [104 L.Ed.2d at p. 689].) James contends that Mansell effectively disposes of the issue involved in this appeal, i.e., whether any portion of his title 38 benefits may be characterized as community property. We think the contention offends principles of res judicata.

"It is well settled that where, as here, an interlocutory judgment of divorce has become final in the sense that it is no longer subject to appeal, motion for new trial or relief pursuant to section 473 of the Code of Civil Procedure, it is res judicata on all questions determined therein including the property rights of the parties." (Grant v.

Superior Curt (1963) 214 Cal.App.2d 15, 20; Dupont v. Dupont (1935) 4 Cal.2d 227, 228.) This is so even though the judgment be by default. (Brown v. Brown (1915) 170 Cal. 1, 5; 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 282, p. 720.) And a subsequent change in the law is, by itself, no reason to disturb a final judgment. (Slater v. Blackwood (1975) 15 Cal.3d 791, 796; see City of Sacramento v. State of California (1990) 50 Cal.3d 51, 65, fn. 8; In re Marriage of Stenquist (1983) 145 Cal.App.3d 430, 432; Zeppi v. State of California (1962) 203 Cal.App.2d 386, 388-389 ["Our courts have repeatedly refused to treat the self-evident hardship occasioned by a change in the law as a reason to revive dead actions; . . ."].) Nor will a final judgment contrary to law be denied res judicata effect. (Smith v. Smith (1981) 127 Cal.App.3d 203, 209.) Thus, when a trial court in a marital dissolution action has determined the parties' property rights

and ordered the property divided, and the judgment has become final, the court generally may not thereafter modify or alter that disposition. (Mueller v. Walker (1985) 167 Cal.App.3d 600, 605.)¹

¹. An exception to this rule is when the court expressly reserves jurisdiction to modify a property award. (Mueller v. Walker, supra, 167 Cal.App.3d at pp. 605-606.) This is to be distinguished, however, from a reservation of jurisdiction to enforce the award, e.g., to oversee the payment of pension benefits as received in the future, to order an accounting for arrearages, or simply to clarify the judgment's terms. (See In re Marriage of Mansell (1989) 217 Cal.App.3d 219, 230, fn.2; In re Marriage of Vanderbeek (1986) 177 Cal.App.3d 224, 237; In re Marriage of Bergman (1985) 168 Cal.App.3d 742, 755, fn. 10.) It is also to be distinguished from an open-ended reservation of jurisdiction to allocate respective property rights in the first instance sometime in the future, a reservation of jurisdiction, it has been held, a court has no authority to make. (In re Marriage of Bergman, supra, at pp. 755-757.) The 1980 judgment in this case expressly reserved jurisdiction of James's retirement benefits, but the language accomplished a present characterization and division of those benefits, and the order did not reserve jurisdiction to modify the property award. We read the court's reservation of jurisdiction, therefore, as no more than a means of overseeing enforcement of the judgment, a reservation that is perhaps unnecessary in any event, as the retention of jurisdiction to make such further orders as are appropriate to compel obedience to the

In this case, the judgment that determined the parties' respective property rights was entered in 1980. No appeal was taken from that judgment, and it is long since final.² The underlying assumption of James's argument here and, perhaps, in the trial court as well, is that the court in this proceeding was adjudicating anew the allocation of James's

court's judgment is inherent in the dissolution process. (See *In re Marriage of Vanderbeek*, supra, at p. 237; *Bonner v. Superior Court* (1976) 63 Cal.App.3d 156, 165-166; Civ. Code, § 4380.)

². In the proceeding we review here, James complained in a declaration that he received no notice of the 1980 dissolution proceedings and judgment. In its ruling, the trial court acknowledged the complaint but noted that no motion to set aside the judgment was before it. After the trial court filed its order and after James filed his notice of appeal from that order, he filed a motion to set aside for fraud that portion of the 1980 judgment that adjudicated the parties' respective rights in his retirement benefits. The last entry in the clerk's transcript is a minute order indicating a hearing on the motion had been continued at the court's request. We have no occasion to review the merits of that motion; if the trial court has since ruled on it, we have not been informed, and we are aware of no appeal pending. For our purposes here, the 1980 judgment is final.

retirement benefits. It was not. Monika's motion simply asked the court to give effect to its 1980 judgment. In the process, the court was called upon to clarify what it intended when it divided James's "retirement benefits." (See *In re Marriage of Sandy* (1980) 113 Cal.App.3d 724, 728 & fn. 3.) The motion did not and could not have the effect of opening the door for James to litigate an issue decided by the court seven years earlier but which he chose not to challenge. (See *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851, fn. 13 ["An interlocutory decree which does not expressly reserve jurisdiction to divide property at a later date (see Civ. Code § 4800), but instead renders a present division of property, if not challenged by appeal becomes a final and conclusive adjudication of the property rights of the parties."]; *In re Marriage of Thomas* (1984) 156 Cal.App.3d 631, 638-639; cf. *Casas v. Thompson* (1986) 42 Cal.3d 131, 141-142, fn. 4.) FUSFSPA has no

application to the 1980 judgment involved here (see *In re Marriage of Castle* (1986) 180 Cal.App.3d 206, 212-214; *In re Marriage of Stier* (1986) 178 Cal.App.3d 42, 49-55; *In re Marriage of Hopkins* (1983) 142 Cal.App.3d 350, 355-356, 360); we review the court's order in this proceeding under the law applicable at the time the original judgment was entered.³

³. We observe here the facts of Mansell. In that case, the parties entered into a marital settlement agreement pursuant to which the husband agreed to pay the wife 50 percent of his military retired pay, including that portion waived to receive title 38 disability benefits. The agreement was incorporated in a 1979 judgment of dissolution. In 1983, the husband sought to vacate and modify the judgment, arguing that FUSFSPA precluded the court from treating as community property the retired pay he waived to receive title 38 benefits. The trial court denied the motion, the California Court of Appeal (Fifth District) affirmed, and the California Supreme Court denied review. (490 U.S. at pp. ____-____ [104 L.Ed.2d at pp. 683-684].) In a footnote to its opinion, the United States Supreme Court observed that the California Court of Appeal "decided that it was appropriate, under California law, to reopen the settlement and reach the federal question. [Citation.] Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-McCarty settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore properly

before us." (Id., at p. _____, fn. 5 [104 L.Ed.2d at p. 684, fn. 5].) On remand, the Court of Appeal again affirmed, clarifying its position on the point raised in the Supreme Court's footnote. (In re Marriage of Mansell, supra, 217 Cal.App.3d 219.) The court noted that it was simply ruling on the trial court's denial of the husband's motion to vacate the 1979 judgment (on grounds of fraud, mistake of law and voidness for want of jurisdiction or, alternatively, an act in excess of the trial court's jurisdiction). It made clear that it did not, and could not, reopen the 1979 judgment and reach the merits of it on the federal question posed: "The essence of our holding in Mansell I was that there was an insufficient showing to disturb a final judgment. [¶] . . . As we have noted, under California law, there was, and is, no basis to reopen the settlement and reach the federal question. However, we should not and do not leave unsaid the conclusion that the ambiguity of our language may have led to the inference drawn by our high court. We can only say we did not do what we could not do. We did not 'reopen the settlement'; indeed, we addressed the federal question only to demonstrate there was no basis for reopening the settlement. This determination necessarily was on of state law, although our rationale for reaching it involved resolution of a federal question." (Emphasis in original, 217 Cal.App.3d at pp. 234-235.) In short, principles of res judicata barred the husband from challenging the 1979 judgment.

We recognize that in In re Marriage of Costo (1984) 156 Cal.App.3d 781, this court construed FUSFSPA in accord with the United States Supreme Court decision in Mansell, and we applied our holding to permit retroactive modification of a 1975 judgment. (See In re Marriage of Stier, supra, 178 Ca.App.3d at p.

A military retirement pension constitutes compensation for past services and is a community asset to the extent it was earned during the marriage. (In re Marriage of Fithian (1974) 10 Cal.3d 592, 604.) Disability benefits, on the other hand, are generally in the nature of compensation for personal injury and loss of future earnings and, to that extent, are not divisible upon dissolution of a marriage. (Washington v. Washington (1956) 47 Cal.2d 249, 253-254.) In In re Marriage of Stenquist (1978) 21 Cal.3d 779, the court considered the manner in which military "retired pay" for disability (see 10 U.S.C. § 1201) should be characterized upon dissolution of a marriage. The court first observed that

53.) The issue arose from a hearing to determine whether the wife was entitled to any portion of the husband's title 38 benefits. The underlying assumption in Costo, however, is that the trial court had reserved jurisdiction to modify its 1975 judgment (see, e.g., In re Marriage of Castle, supra, 180 Cal.App.3d at pp. 210, 212), a fact not present here. Costo did not present the issue whether principles of res judicata barred redetermination of the rights there involved.

the amount of retired pay to which a serviceman is entitled for disability is based largely on his monthly pay at retirement, which is in turn a function of longevity of service and rank achieved at the time of retirement. (Id., at p. 784, see 10 U.S.C. § 1401.) The court held that because the serviceman husband in that case was otherwise eligible for a retirement pension based on longevity of service, the predominate function of the disability retired pay he had chosen in lieu of longevity pension was to provide retirement support, not to compensate him for loss of earning capacity or for personal suffering. (21 Cal.3d at pp. 787, 791.) The court reasoned, "The purpose of disability benefits, as we explained in Jones [In re Marriage of Jones (1975) 13 Cal.3d 457], is primarily to compensate the disabled veteran for 'the loss of earnings resulting from his compelled premature military retirement and from diminished ability to compete in the civilian job market'

(13 Cal.3d at p. 459) and secondarily to compensate him for the personal suffering caused by the disability. Military retired pay based on disability, however, does not serve those purposes exclusively. Because it replaces a 'retirement' pension, and is computed in part on the basis of longevity of service and rank at retirement, it also serves the objective of providing support for the serviceman and his spouse after he leaves the service. Moreover, as the veteran approaches normal retirement age, this latter purpose may become the predominate function serve by the 'disability' pension." (21 Cal.3d at p. 787.) Thus only the net amount of disability retired pay over and above what would have been received as ordinary retirement benefits may be considered the spouse's separate property as compensation for disability along; amounts received in lieu of ordinary retirement benefits remain subject to division as community property. (Id., at pp. 787-789.) Whether the property at issue

is disability retired pay under title 10, as in Stenguist, or Veterans Administration disability benefits under title 38 (which is computed solely on the basis of disability), as here, is of no consequence to the analysis; in order to receive title 38 benefits, the veteran must waive his right to an equivalent amount of retirement pay. "The reasoning of Stenguist applies with equal force to this situation and to title 10 disability benefits. However classified for administrative purposes, disability benefits under Stenguist are separate property in California only insofar as they exceed the amount of retirement pay waived." (In re Marriage of Milhan (1980) 27 Cal.3d 765, 776.) In short, the label does not control the characterization of the benefits; rather, the character of the benefits is determined by looking behind their label and ascertaining the predominate function served by the benefits. (In re Marriage of Stenguist, supra, 21 Cal.3d at pp. 786-787.)

Stenquist involved a serviceman who was eligible for both longevity and disability retirement and who chose disability retirement because it provided greater benefits. The court said, "We cannot permit the serviceman's election of a 'disability' pension to defeat the community interest in his right to a pension based on longevity." (21 Cal.3d at p. 786) James argues that Stenquist's facts and its reasoning are distinguishable because, unlike the serviceman in that case, James was retired for disability involuntarily (i.e., he did not "elect" it) and before he was eligible for a longevity pension.⁴ Subsequent applications of Stenquist have not limited that case to its unique facts, however.

⁴. James would have been eligible for retirement after 20 years of service. (10 U.S.C. § 3914.) To the extent his argument turns on the fact that his right to a longevity pension had not yet vested, In re Marriage of Brown, supra, 15 Cal.3d 838, did away with the notion that nonvested pension rights earned during marriage are mere expectancies and therefore not property subject to division upon dissolution.

In *In re Marriage of Webb* (1979) 94 Cal.App.3d 335, the husband, a police officer, had been compelled to retire from the force prematurely at the age of 39 because of disability. The city charter provided that, until he reached service retirement age (50), he would receive a disability pension based on the degree of his disability. After age 50, his pension would be recalculated to equal the amount he would have received as a service retirement had he continued on the force at the rank held when retired for disability. (*Id.*, at pp. 339-340.) The court held the husband's pension after age 50 to be community property subject to division. The court reasoned that, although the husband was compelled to retire prematurely and could not elect between a disability pension and a longevity pension, the predominant purpose of his pension after age 50 was to provide support as if he had retired for service; after age 50, the pension was no longer related to

his disability but instead to years of service he would have rendered but for that disability. (Id., at pp. 341-343; see also *In re Marriage of Samuels* (1979) 96 Cal.App.3d 122 [civil service "disability annuity" for premature retirement at age 50; employee eligible for "deferred retirement annuity" at age 62; deferred retirement annuity held divisible community asset]; *In re Marriage of Pace* (1982) 132 Cal.App.3d 548 [same].)

In *In re Marriage of Justice*, supra, 157 Cal.App.3d 82, the husband, a police officer, retired prematurely because of disability and received a disability pension; because his retirement was premature, he could not elect to receive a service pension. The disability pension was more than the husband would have received as a service pension had he continued on the force until retirement age. The court held that, after the husband reached retirement age, only the excess of the "disability" pension over and above what the husband would

have received as a service pension had he continued on the force at the same rank was attributable to compensation for disability and hence the husband's separate property; the balance performed the function of normal service retirement benefits which, although not vested when the husband retired for disability, was community property to the extent earned during the marriage. The court observed that, as the city charter provided no police officer may receive a service pension while retired for service-connected disability, a police officer's disability pension was intended to replace service retirement benefits as well as to compensate for disability. (Id., at pp. 88-89.) The court implicitly rejected the husband's argument that the involuntary nature of his retirement was relevant when it observed that the record did not show whether the retirement was voluntary or involuntary. (Id., at p. 85, fn. 2; cf. *In re Marriage of Stier*, supra, 178 Cal.App.3d at

p. 48, fn. 8 [noting the issue but concluding there was no need to address it].)

The most expansive interpretation of Stenquist has come from the California Supreme Court itself. In *In re Marriage of Saslow* (1985) 40 Cal.3d 848, the husband, a physician in private practice, had purchased disability insurance during the marriage with community funds; he did not invest in a retirement plan. The husband subsequently became totally disabled and collected benefits on the insurance policies. Relying on its reasoning in Stenquist, the court held that the husband's disability benefits should be treated as his separate property to the extent they are intended to replace postdissolution earnings and community property to the extent they are intended to provide retirement income. (40 Cal.3d at pp. 860-861.) The court cited with approval the post-Stenquist Court of Appeal cases that held employer-provided disability benefits that function as retirement pay must

be treated as community property. "These courts reasoned that when the employee-spouse reaches the age at which he would be eligible for a retirement pension, 'the predominate purpose of his [disability] benefits [] shift[s] to retirement support.' [Citation.]

[¶] Accordingly, disability benefits have been denominated community property to the extent that they equal the benefits foregone under a retirement pension. [Citation.] Courts have determined the age at which the 'shift' in purpose to retirement support takes place by looking to the age of retirement eligibility specified in the employment contract. [Citations.]" (40 Cal.3d at p. 859.)⁵

In this case, James's receipt of title 38

⁵. The court observed the difficulty in the case before it in applying the "Stenquist purpose analysis" to determine which portion of the husband's benefits served which purpose, as there was no alternative retirement plan against which to compare the disability payments, and there is no fixed retirement age for a physician in private practice. Nonetheless, the court held these matters ascertainable in an evidentiary hearing. (40 Cal.3d at pp. 859-861.)

disability benefits, which are based solely on the nature and extent of the disability, is conditioned upon his waiving an equivalent amount of the title 10 disability retired pay to which he is otherwise entitled. To the extent title 10 pay is based on rank at time of retirement, however, its predominant purpose after James reached normal retirement age was to compensate him for years of service. Thus the portion of title 38 benefits received in lieu of that pay simply replaces service retirement support; the "disability" label is irrelevant. Equally irrelevant is the involuntary nature of James's retirement. The key point is that a portion of the benefits received is attributable to length of service; to the extent earned during the marriage that portion is community property subject to division. In sum, the portion of James's title 38 benefits received in lieu of what he would have received as a service pension had he continued in the army for 20 years at the

rank at which he was retired is community property to the extent earned during the marriage; any excess is attributable solely to James's disability and is therefore his separate property. This is the manner in which the trial court clarified its allocation of James's "retirement benefits" in the 1980 judgment and then ordered the judgment carried out. There was no error.

The judgment (order) is affirmed.

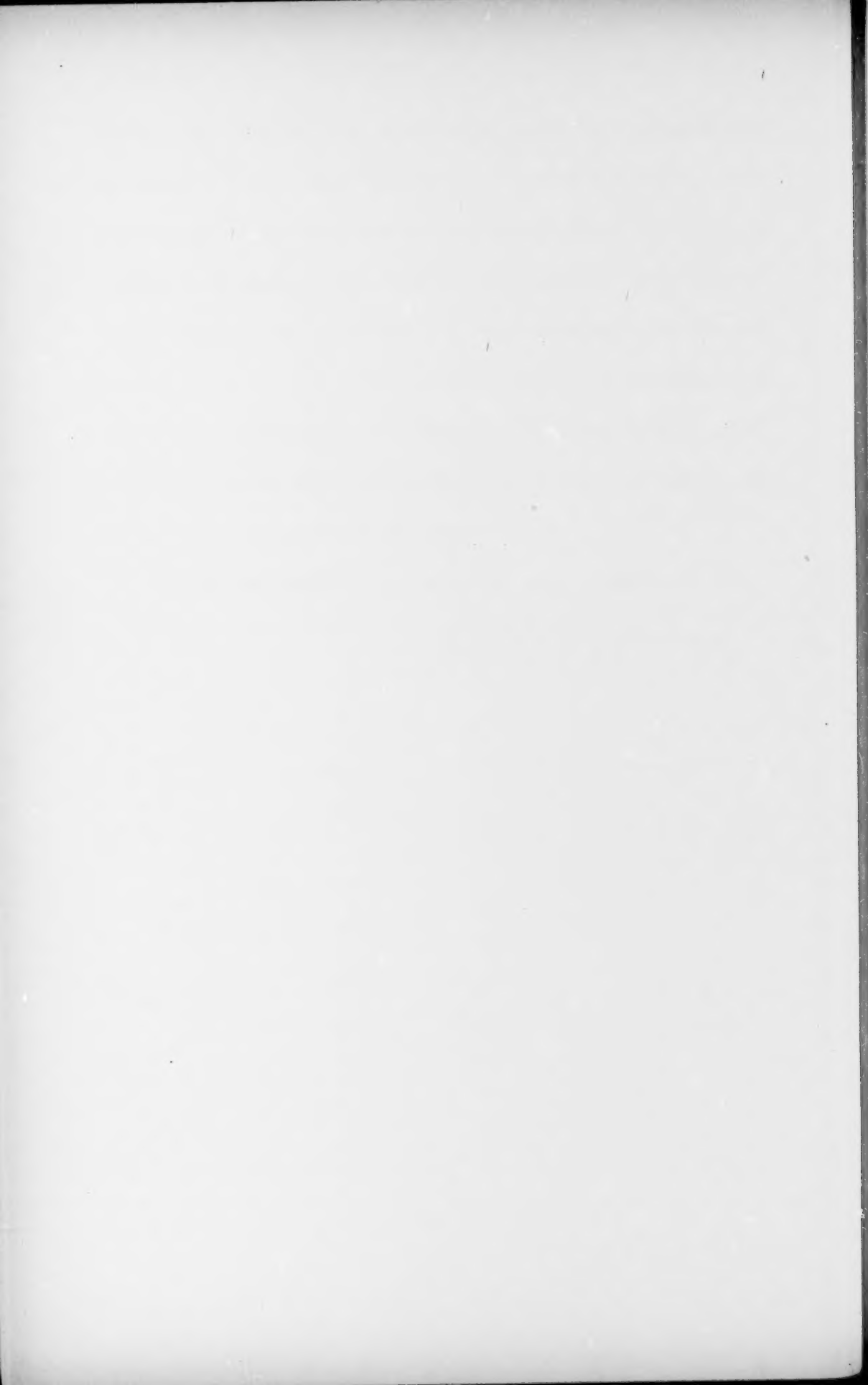
EVANS,
Acting, P.J.

We concur:

BLEASE, J.

DAVIS, J.





IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
THIRD APPELLATE DISTRICT

FILED
Jun 27 1990
Court of Appeal-Third
District
ROBERT L. LISTON,
Clerk
By _____,
Deputy

MARRIAGE OF
MONIKA M. & JAMES O. BLACKSHIRE, JR.

MONIKA BLACKSHIRE
Respondent

vs.

3 Civil C005223
Sacramento 726258

JAMES O. BLACKSHIRE, JR.
Appellant

By the Court:

Appellant's petition for rehearing is
denied.

Dated: June 27, 1990

EVANS, Acting P.J.

APPENDIX B



SUPREME COURT
F I L E D
Aug 22 1990
ROBERT WANDRUFF
CLERK

Deputy

O R D E R D E N Y I N G R E V I E W
AFTER JUDGMENT BY THE COURT OF APPEAL

Third Appellate District
No. C005223
S016497

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

I N B A N K

In Re the Marriage of
MONIKA M. AND JAMES O BLACKSHIRE

MONIKA M. BLACKSHIRE, Respondent

v.

JAMES O BLACKHSIRE, Appellant

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX C



VIRGINIA S. MUELLER
106 "L" Street
Sacramento, CA 95814
(916) 446-3063

ENDORSED:
Filed
OCT 14 1980

J. A. SIMPSON,
Clerk
By L. STEPHENS
Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO
720-9th Street
720-9th Street
Sacramento, California 95814

MARRIAGE OF

Petitioner: MONIKA M. BLACKSHIRE

Respondent: JAMES O. BLACKSHIRE, JR.

INTERLOCUTORY JUDGMENT OF
DISSOLUTION OF MARRIAGE

CASE NUMBER
726258

1. This proceeding came on for x default
or uncontested _____ contested hearing as
follows

a. Date: 9/25/1980 x Dept.: 14 _____
Div.: _____ Room:

b. Judge (name): CAROL MILLER
_____ Temporary judge

c. x Petitioner present in court x
Attorney present in court (name): VIRGINIA S.
MUELLER

d. _____ Respondent present in court _____
Attorney present in court (name):

e. _____ Claimant present in court _____
Attorney present in court (name):

2. The court acquired jurisdiction of the
respondent on: December 8, 1979 (First Amend-

ed Petition and Summons).

a. x Respondent was served with process.

b. Respondent appeared.

3. THE COURT ORDERS.

a. An interlocutory judgment be entered and the parties are entitled to have their marriage dissolved.

b. After six months from the date the court acquired jurisdiction of the respondent a final judgment of dissolution may be entered upon proper application of either party or on the court's own motion, unless a dismissal signed by both parties is filed. The final judgment shall include such other and further relief as may be necessary to complete disposition of this proceeding, but entry of the final judgment shall not deprive this court of its jurisdiction over any matter expressly reserved to it in this or the final judgment until a final disposition is made of each such matter.

c. Jurisdiction is reserved to make such other and further orders as may be necessary to carry out the provisions of this judgment.

4. x THE COURT FURTHER ORDERS

a. Wife's former name be restored (specify):

b. Other:

Petitioner is awarded the care, custody and control of James Oliver Blackshire born August 24, 1966. Respondent is awarded the right of reasonable visitation with the minor child of

the parties.

Dated://
Judge of the Superior Court

5. Total number of pages attached: 2
____ Signature follows last
attachment

THIS INTERLOCUTORY JUDGMENT DOES NOT CONSTITUTE A FINAL DISSOLUTION OF MARRIAGE AND THE PARTIES ARE STILL MARRIED. ONE OF THE PARTIES MUST SUBMIT A REQUEST FOR FINAL JUDGMENT ON THE FORM PRESCRIBED BY RULE 1288. NEITHER PARTY MAY REMARRY UNTIL A FINAL JUDGMENT OF DISSOLUTION IS ENTERED.

No attachment permitted on less than a full page. Cal Rule of Ct 201(b)

INTERLOCUTORY JUDGMENT OF
DISSOLUTION OF MARRIAGE
(FAMILY LAW)

Form Adopted by Rule 1287
Judicial Council of California
Revised Effective January 1, 1980

CC 4512, 4514

In re the marriage	)	CASE NUMBER
	)	726258
Petitioner: MONIKA M.)	
BLACKSHIRE	)	INTERLOCUTORY
	)	JUDGMENT OF
and	)	DISSOLUTION OF
	)	MARRIAGE
Respondent: JAMES O.)	
<u>BLACKSHIRE, JR.</u>	)	Page 2

Inasmuch as the minor child James Oliver Blackshire, is eligible for a monthly payment from the Social Security Administration, U. S. Department of Health, Education and Welfare through benefits due respondent, no other child support is ordered at this time.

Petitioner waives spousal support.

Petitioner waives an equal division of the community property of the parties, and the court orders that it be divided as follows:

A. To Petitioner:

1. One-half of the household furniture, furnishings and appliances.
2. 1967 Ford automobile.

B. To Respondent:

1. One-half of the household furniture, furnishings and appliances.

2. 1974 Pontiac Lemans automobile.

3. Respondent's savings account at Tahoe Savings and Loan.

4. Respondent's two life insurance policies on his life.

C. Respondent is ordered to pay the deficiency due Ford Motor Credit Company remaining following the repossession of the 1977 Ford Mustand and to hold petitioner harmless therefrom.

D. Respondent is ordered to pay any balance due Montgomery Ward and to hold petitioner harmless therefrom.

E. The Court orders that as soon as possible the parties are to sell the real property known as 10500 Abbottford Way, Rancho Cordova, California

In re the marriage	)	CASE NUMBER
	)	726258
Petitioner: MONIKA M.)	
BLACKSHIRE	)	INTERLOCUTORY
	)	JUDGMENT OF
and	)	DISSOLUTION OF
	)	MARRIAGE
Respondent: JAMES O.)	
<u>BLACKSHIRE, JR.</u>	)	Page 3

described as follows:

Lot 439, as shown on the "Plat of Cordova Towne Unit No. 6", recorded June 16, 1960 in Book 61 of Maps, Map No. 16, records of said County.

Petitioner is to be reimbursed for any necessary expenditures she makes for said sale including dry rot repairs and painting. After the loans secured by the First Deed of Trust to Allstate and the Second Deed of Trust to Beneficial Thrift have been paid, the net proceeds are to be used to pay the remaining community obligations of the parties including the following:

Mervyn's in the approximate amount of \$200.00,

Lerner's in the approximate amount of \$120.00,

Union Oil Company in the sum of approximately \$350.00,

Citibank Master Charge in the approximate sum of \$500.00,

American Express in the approximate sum of \$1,000.00.

The proceeds from the sale of the house remaining after the payment of community obligations is to be divided equally between the parties.

F. The court retains jurisdiction over respondent's retirement benefits and orders that petitioner receive monthly payments equal to one-half of that portion of the retirement equal to the following fraction:

9 years and four months (from January, 1967 to May, 1975).
total years of respondent's military service.

The court confirms that respondent's retirement benefits earned prior to January 6, 1967 are his separate property.

DATED: OCT 14 1980

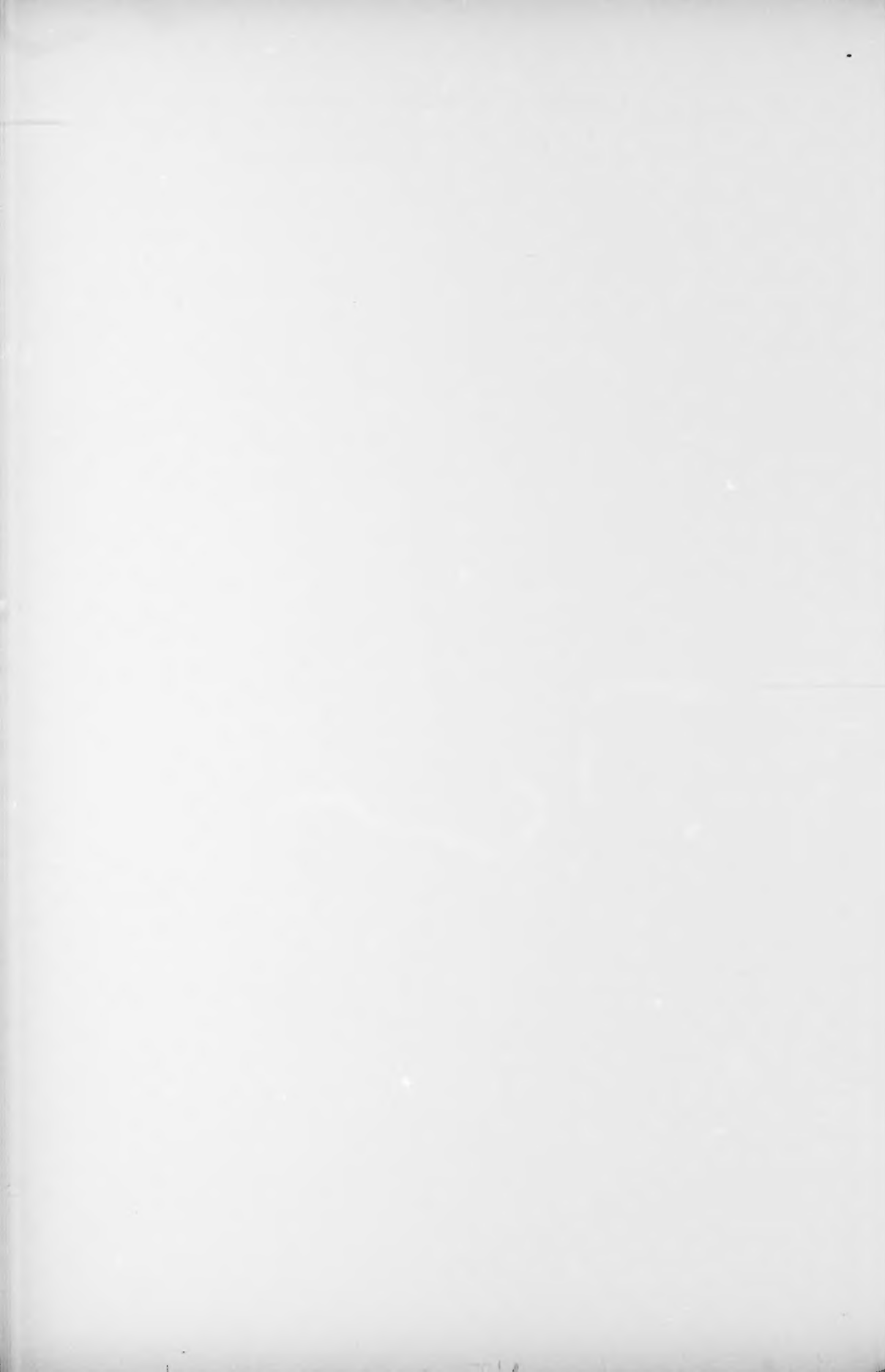
CAROL MILLER
JUDGE OF THE SUPERIOR COURT

ATTEST:

J. A. SIMPSON, CLERK
By L. Stephens
Deputy Clerk

[Seal]





ENDORSED
JUL 20 1988
JOYCE RUSSELL SMITH,
CLERK
By: V. DUFFEK, Deputy

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

In re the Marriage of	)	NO. 726258
	)	DEPT. 13
MONIKA BLACKSHIRE,)	
	)	NOTICE OF RULING
Petitioner,	)	ON
	)	<u>SUBMITTED MATTER</u>
and)	
)	
JAMES BLACKSHIRE,)	
)	
Respondent.)	
_____)	

The Court has considered the declarations and other matters of record and now rules on petitioner's motion for share of respondent's military retirement benefits. These issues are raised in relation to petitioner's motion filed March 11, 1988, to account for benefits previously received and to order distribution of future benefits. The final judgment en-

tered December 16, 1980, found a community interest in the retirement benefits and was entered after respondent's retirement. There was no appeal from that judgment. Although respondent's declaration of March 30, 1988, states that the judgment was obtained by default and without notice, no motion to set aside that judgment is before the Court.

The judgment of dissolution entered October 14, 1980, provides as follows with respect to respondent's retirement benefits:

"The Court retains jurisdiction over respondent's retirement benefits and orders that petitioner receive monthly payments equal to one-half of that portion of retirement equal to the following fraction:

9 years and four months (from January 1967 to May, 1975). Total
years of respondent's military service.

The Court confirms that respondent's retirement benefits earned

prior to January 6, 1967 as his separate property."

Respondent was initially placed on a temporary disability retirement and retired from the army effective May 7, 1975. He was removed from temporary disability on February 28, 1977, and placed on permanent disability on February 28, 1977, at a rating of 100 percent disability. Documents submitted by respondent show he was retired for life under Chapter 61, Title 10 U.S.C. section 1201. Respondent subsequently applied for disability retirement benefits from the Veterans Administration under Title 38, U.S.C. which required waiver of other retired pay benefits.

Respondent's contentions are that his disability retirement was involuntary and calculated solely on his percentage of disability. Further, he had not served 20 years to qualify for longevity military retirement benefits at the time of his placement on disability in 1975. Petitioner contends that

she should be awarded a portion of respondent's retirement benefits commencing at the time that respondent would have become entitled to longevity retirement benefits after 20 years of military service.

The primary issue is whether petitioner is entitled to share in respondent's disability retirement under the principles set for In re Marriage of Stenquist (1978) 21 Cal.3d 779.¹ In the Stenquist case, the Court held that military disability retirement pay is to be allocated to the community where the employed spouse elects to receive disability benefits in lieu of a matured right to retirement benefits. The amount received in lieu of matured retirement benefits remains community property subject to division on dissolution. The excess of the disability retirement bene-

¹. Neither party has addressed the issue of jurisdiction of this Court over Title 38 disability. If the issue were raised, the Court would find jurisdiction under the rationale of Marriage of Daniels (1986) 186 Cal.App.3d 1084, contra Marriage of Costo (1984) 156 Cal.App.3d 781.

fits is separate property. The rationale of the Stenquist decision was that although disability benefits are ordinarily separate property because their purpose is to compensate for loss of earnings and personal suffering caused by the disability, they also provide for the support for the retiree and his spouse after normal retirement age. The Stenquist Court found that allocation was required because it would be unfair to permit the retiree by election of a disability pension to defeat the community interest in a pension based upon longevity and it would be unjust to deprive the other spouse of a valuable property right because a misleading label has been affixed to the pension benefits. A number of cases subsequent to the Stenquist decision have held that where the disabled spouse elects disability payments prior to reaching retirement age, payments of disability prior to retirement age are separate property but those after retirement age are sub-

ject to allocation to the community. In re Marriage of Samuels (1979) 96 Cal.App.3d 1122; In re Marriage of Webb (1979) 97 Cal.App.3d 335; In re Marriage of Pace (1982) 132 Cal.App.3d 548. In each of these cases, there were vested retirement benefits derived from employment during marriage.

Respondent in this case seeks to distinguish the foregoing cases in that his longevity retirements were not vested at the time of his disability retirement and will never vest because he was involuntarily retired and will not satisfy the requirement that he have 20 years of military service. Further, he did not elect disability pay but was placed on involuntary disability retirement. In In re Marriage of Justice (1984) 157 Cal.App.3d 82, as in the present case, the employed spouse did not have vested longevity retirement benefits at the time he was retired for disability. Nonetheless, the Court held that the community was entitled to share the

retirement benefits to the extent that they performed the function of normal service retirement and were earned during the marriage.²

In the present case, the Court finds that there is a community property interest in the respondent's retirement even though he was involuntarily retired and did not serve the 20-year-period necessary to qualify for a longevity military retirement. Respondent was required to waive all other retirement benefits in order to qualify for the Veterans Administration benefits under Title 38.

². The Court distinguished In re Marriage of Jones (1975) 13 Cal. 434, 437 which held that disability retirement benefits are separate property if a service pension has not vested at the time of retirement for disability. See also In re Marriage of Loehr (1975) 13 Cal.3d 465. The Justice court concluded that the principles underlying the Jones case were overturned by In re Marriage of Brown (1976) 15 Cal. 38 (sic) which held that both vested and non-vested pension rights derived from employment during marriage constitute community assets. In re Marriage of Cullen (1983) 145 Cal.App.3d 424 suggests a contrary result but did not consider the effect of the Brown case on the Jones decision.

Respondent correctly contends that his Veteran Administration disability benefits are calculated solely on the bases of percentage of disability. 38 U.S.C. sections 331, 334. However, to obtain those benefits he was required to waive all other military disability and longevity retirement benefits. 38 U.S.C. section 3104 and 3105. The Title 61 disability retirement benefits he waived are based in part on longevity of service and rank at retirement. In Stenquist the California Supreme Court expressly recognized that the predominate function of disability retired pay under Title 61 is the retirement support of the serviceman as the serviceman approaches normal retirement age. The Court concludes that when the respondent would have had 20 years of service, the predominant function of the retirement benefits was to provide support for him rather than to compensate him for lost earnings and his disability. The fact that the retirement was involuntary is not deter-

minative.³ Rather, the proper focus is the purpose of the retirement payments. The Court, therefore, finds that there is a community property interest in the respondent's retirement which is equivalent to the ratio set forth in the judgment of dissolution. The longevity retirement benefits are to be calculated as those that respondent would have been entitled to receive had he retired after 20 years of military service at the rank and pay that he was receiving upon his initial disability retirement. Any excess is respondent's separate property either because it was attributable to service during a period when he was not married or is otherwise attributable to the disability itself.

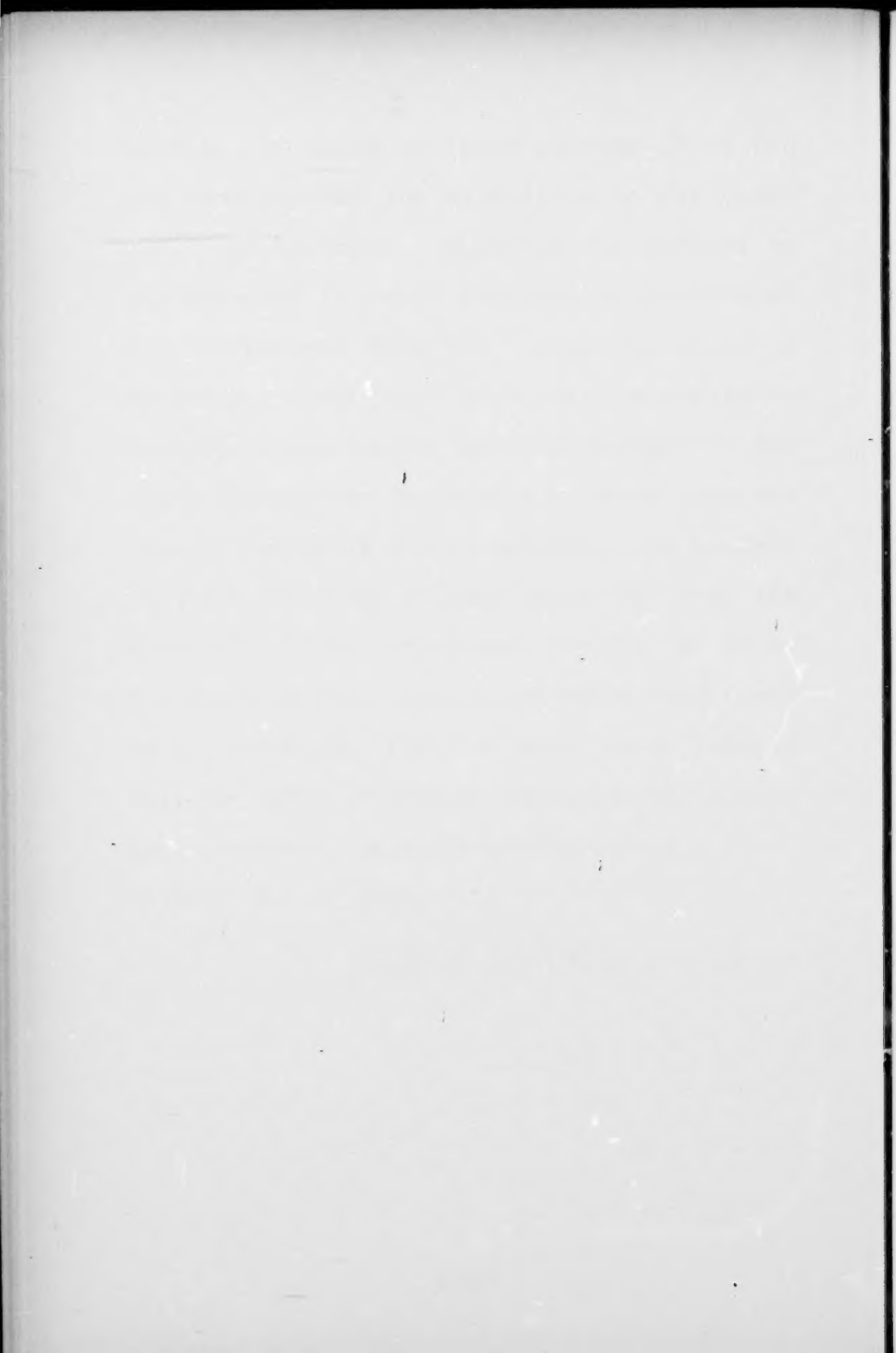
The Court finds that the respondent is also obligated to pay petitioner her one-half share in the community interest in the military retirement from the time that he would

³. This issue was raised but not decided in In re Marriage of Stier (1986) 178 Cal.App.3d 42.

have had 20 years military service if he had not been retired for disability to the present. In addition, respondent is ordered to pay directly to petitioner that proportion of his retirement benefits as it is received hereafter. The Court will reserve jurisdiction to determine the specific amounts in the event the parties are unable to agree upon the same. The Court denies petitioner's request to make an order payable directly from the military to the petitioner for her share of the military retirement benefits in that there is no provision for the same under Federal Uniform Services Former Spouse's Protection Act (FUSFSPA), 10 U.S.C. section 1408.

DATED: Jul 22 1988

STEVEN H. RODDA
JUDGE OF THE SUPERIOR COURT



APPENDIX F:
Texts of Constitutional and
Statutory Provisions

United States Constitution

Supremacy Clause. Art. VI, Cl. 2.

[T]he Laws of the United States...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Delegation of Powers Clause. Art. I, §8, Cl. 12, 14.

The Congress shall have Power ... To raise and support Armies ... To make Rules for the Government and Regulations of the land and naval forces

Statutes.

28 U.S.C. § 1408, 96 Stat. 718, 730-738, Pub. L. No. 97-252 (1982). Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) "Court" means-

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent juris-

diction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c)));

(iii) division of property (including a division of community property); and

(C) in the case of division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay of a member to a spouse or former spouse of that member.

(3) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed

for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which--

(A) are owed by that member to the United States;

(B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(F) are deducted because of an election under chapter 73 of this title to

provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(5) "Member" includes a former member.

(6) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of the court order, was married to that member.

(b) For the purposes of this section--

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order --

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) (1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired or retainer pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) (1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony

or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired or retainer pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired or retainer specifically provided for in the court order. In the case of a member entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired or retainer pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired or retainer pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired or retainer pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of the disposable retired or retainer pay of the member as a property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than one each month, and the Secretary concerned shall not

be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired or retainer pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired or retainer pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired or retainer pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired or retainer pay.

(e) (1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) may not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired or retainer pay of a member shall be used to satisfy (subject to the limitations of paragraph (1)) such court courts on a first-come, first-served basis.

Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3) (A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall --

(i) pay to that spouse from the member's disposable retired or retainer pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) Retain an amount of disposable retired or retainer pay that is equal to the lesser of --

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus --

(I) the amount of disposable or retainer pay paid under clause (i); and

(II) the amount of disposable retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4) (A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process shall be on a first come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after

the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding the other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of such pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired or retainer pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obliga-

tion of a member may be enforced by any means available under the law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) (1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) A person receiving effective service of a court order under this section shall, as soon as possible, but not later 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

U. S. Const. Art. I, §8:

Cls: 12: To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13: Navy: To provide and maintain a navy.

14: Military and Naval Rules: To make rules for the government and regulation of the land and naval forces;

16: Militia, Organizing and Arming: To provide for organizing, arming, and disciplining, the militia and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officer, and the authority of training the militia according to the discipline prescribed by Congress.

STATE STATUTES:

Civil Code §4363.3: ["Employee pension benefit plan"] As used in this part, the term "employee pension benefit plan" includes public and private retirement, pension, profit sharing, stock bonus, thrift and similar plans of deferred compensation, whether of the defined contribution or defined benefit type.

Civil Code §5118: [Earnings and accumulations constituting separate property: Income of spouse and children living separate from other spouse:] The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while separate and apart from the other spouse, are the separate property of the spouse.





10 USCS Chapter 61

**§1201. Regulars and members on active duty
for more than 30 days; retirement**

Upon a determination by the Secretary concerned that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under section 270(b) of this title [10 USCS §270(b)] for a period of more than 30 days, is unfit to perform the duties of his office, grade, rank, or rating because of physical disability incurred while entitled to basic pay, the Secretary may retire the member, with retired pay computed under section 1401 of this title [10 USCS §1401], if the Secretary also determines that --

(1) based upon accepted medical principles, the disability is of a permanent nature and stable;

(2) the disability is not the result of

the member's intentional misconduct or willful neglect, and was not incurred during a period of unauthorized absence, and

(3) either --

(A) the member has at least 20 years of service computed under section 1208 of this title [10 USCS § 1208]; or

(B) the disability is at least 30 percent under the standard schedule of rating disability in use by the Veterans' Administration at the time of the determination; and either --

(i) the member has at least eight years of service computed under section 1208 of this title [10 USCS § 1208];

(ii) the disability is the proximate result of performing active duty;

(iii) the disability was incurred in line of duty in time of war or national emergency; or

(iv) the disability was incurred in line of duty after September 14,

1978.

38 USCS § 3104

§ 3104. Prohibition against duplication of benefits.

(a)(1) Except to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay, or initial award of naval pension granted after July 13, 1943, shall be made concurrently to any person based on his own service or concurrently to any person based on the service of any other person.

(2) Notwithstanding the provisions of paragraph (1) of this subsection and of section 3105 of this title [38 USCS § 3105], pension under section 521 or 541 of this title [38 USCS § 3105] concurrently with such person's receipt of such retired or retirement pay if the annual amount of such retired or retirement pay is counted as annual income for the purposes of chapter 15 of this title [38 USCS §§ 501 et seq.]

(b)(1) Except as provided in paragraphs (2) and (3) of this subsection and in section 521(i) of this title [38 USCS § 521(i)], the receipt of pension, compensation, or dependency and indemnity compensation by a widow, child, or parent on account of the death of any person, or receipt by any person of pension or compensation on account of his own service, shall not bar the payment of pension, compensation, or dependency and indemnity compensation on account of the death or disability of any other person.

(2) Benefits other than insurance under laws administered by the Veterans' Administration may not be paid or furnished to or on account of any child by reason of the death of more than one parent in the same parental line; however, the child may elect one or more times to receive benefits by reason of the death of any one of such parents.

(3) Benefits other than insurance under laws administered by the Veterans' Administra-

tion may not be paid to any person by reason of the death of more than one person to whom he or she was married; however, the person may elect one or more times to receive benefits by reason of the death of any one spouse.

(c) Pension, compensation, or retirement pay on account of his own service shall not be paid to any person for any period for which he receives active service pay.

